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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning	)	DA 91-577
Regulation of Satellite	)	45-DSS-MISC-93
Earth Stations	)	

FURTHER REPLY COMMENTS
OF THE
SATELLITE BROADCASTING
AND COMMUNICATIONS ASSOCIATION OF AMERICA

Pursuant to the Report and Order and Further Notice of Proposed Rulemaking ("Order" or "Further Notice") released by the Commission on March 11, 1996 in the above-captioned proceeding, the Satellite Broadcasting and Communications Association of America ("SBCA") hereby submits these Further Reply Comments.

At the outset, SBCA again commends the Commission on the important and much-needed action it has taken in its new preemption rule to facilitate consumer access to satellite services. The recently adopted preemption rule is a tremendous step forward in the Commission's implementation of the Congressional intent expressed in sections 205 and 207 of the Telecommunications Act of 1996 ("1996 Act"), as well as the Commission's long-standing policy of "ensuring that the American people . . . have wide access to all available technologies and information services."[1] Indeed, Congress' adoption of sections 205 and 207, as part of the 1996 Act, and the FCC's subsequent adoption of the preemption rule it previously proposed, demonstrate just how in sync the Congress and Commission have been on this issue.

[1] Order at ¶ 15.

The preemption rules governing zoning regulations are now in effect. This hopefully signals the end of many of the long-standing abuses visited upon satellite antenna owners and prospective owners by state and local zoning regulations. While SBCA has proposed some clarifications to the new preemption rule, the important fact is that the preemption rule fosters viewer access to a variety of video programming services and promotes competition in the video services marketplace. SBCA intends to oppose vigorously the numerous petitions for reconsideration filed by local governments that contest the Commission's actions to implement the new preemption rule, and we will do so in a subsequent filing. The prompt denial of those petitions, along with the extension of the preemption rule to nongovernmental restrictions in this Commission proceeding, will allow all concerned to turn their attention to the business of delivering and competing in a vibrant market, with the result being a diverse array of video signals available to consumers.

In these Further Reply Comments, SBCA focuses on the Commission's proposed paragraph (f), which preempts nongovernmental restrictions that impair viewers' reception of satellite signals. For the reasons set forth below, the Commission should reject the arguments of those who seek to derail paragraph (f). The proposed rule properly implements the legislative directive and intent of section 207 and should be adopted promptly.

I. THE NATIONAL APARTMENT ASSOCIATION'S EFFORTS TO NARROW AND DERAIL THE COMMISSION'S RULE SHOULD BE REJECTED

The National Apartment Association, *et al.* ("NAA") urges the Commission to "clarify" that proposed paragraph (f) will not apply to individuals who rent rather than own their

homes.[2] Such a clarification, however, would in fact constitute a dramatic narrowing of the Commission's proposed rule in a manner that is not warranted and is flatly inconsistent with both the federal interest at stake here and section 207 of the 1996 Act.

A. The Proposed Rule Appropriately Is Not Limited In Application To Only Those Individuals Who Are Not Passed By Cable Or Own Their Homes

However unwittingly, NAA's comments demonstrate NAA's total disregard for the statutory constraints -- and mandates -- imposed by the 1996 Act, as well as the strong federal interest in assuring a diversity of programming sources. As the Commission has explained, that diversity is furthered by its "policy to ensure that access to satellite services is available through wide use of earth station antennas."[3] In NAA's view, so long as consumers have access to cable service, they have no need for nor the legal right to other services like DBS.[4] NAA reasons that, "[the] subscriber can still receive some form of video programming. Surely the law does not mean that every technology must always be available to every individual . . . ."[5]

NAA's reasoning is fundamentally flawed. The law was enacted precisely to ensure that every individual will have many different sources and technologies available that provide video programming services. Had Congress agreed with NAA that cable service is sufficient, Section 207 would have been limited to the four percent of households nationwide that are not

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[2] Joint Comments of the National Apartment Association, *et al.* at i ("NAA Joint Comments"); *see also* Letter from Dan Margulies, CHIP, to FCC of April 2, 1996. Alternatively, NAA urges the Commission not to adopt paragraph (f) at all. NAA Joint Comments at 1-2.

[3] Order at ¶ 15.

[4] NAA Joint Comments at 13.

[5] *Id.*

passed by cable.[6] Section 207, however, has no such limitation. Indeed, it is exactly because of the prevalence of the attitude articulated by NAA -- *viz.*, so long as consumers have access to *some* video programming service (typically cable), they can be foreclosed from having access to other services like DBS -- that the Commission's proposed preemption rule is critically important. NAA's effort to reopen a debate settled by the statute (that access to cable does not obviate the right to access to DBS) should be soundly and summarily rejected.

Likewise, NAA's proposed "clarification" also stands in direct contravention of FCC policy. The Commission has stated that it "is committed to ensuring access to all technologies including those that compete with cable."[7] Unlike NAA, the Commission recognizes that access to cable alone does not constitute a diversity of program services. The Commission should stand firm in its long-standing commitment to ensure that a broad array of services are available to all consumers.

Just as there is nothing in the 1996 Act or Commission policy limiting Section 207 to consumers not already served by cable, there is likewise nothing limiting Section 207 to property owners.[8] Nothing in this Act or elsewhere (including the FCC's rules and policies) suggests that property owners have any greater entitlement to receive satellite signals than renters. Indeed, SBCA vigorously opposes any such notion.

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[6] *See Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates*, Notice of Proposed Rulemaking, 10 FCC Rcd 11951, 11957 (1995)(96 percent of all television households are passed by cable).

[7] *Id.*

[8] Similarly, there is nothing in the Act that would exclude from the preemption rule non-residential, commercial properties. This request of NAA should thus similarly be rejected.

B. The Proposed Rule Does Not Effectuate a Taking

NAA's efforts to characterize the FCC's proposed preemption rule as a taking is a rather creative, but ultimately unpersuasive, last-ditch effort to derail the FCC's implementation of the 1996 Act. The FCC's action does not effectuate a taking. Contrary to NAA's assertion, the FCC's rule does not "regulate the emplacement of antennas in or on private buildings."[9] The FCC's rule simply preempts restrictions that impair individuals' ability to receive DBS signals.

NAA's reliance on *Loretto v. Teleprompter Manhattan CATV Corp.*[10] as justification for its argument is misplaced. The Court in *Loretto* emphasized the narrowness of its ruling,[11] and the factors relied on to find a taking there are simply not present here. In *Loretto*, for example, a dispositive fact was that the New York law in question gave outside parties (cable operators) rights, and did "*not* purport to give the *tenant* any enforceable property rights...."[12] Indeed, the court noted that if the law were written in a manner that required "cable installation if a tenant so desires, the statute might present a different question . . . ."[13] The FCC's proposed rule stands in direct contrast to the New York law at issue in *Loretto* and thus poses just such a different question, which in turn warrants a different answer. Here, it is the *viewers* who are given rights if their reception is impaired; no rights are bestowed on outside parties.

There is, moreover, no *permanent* occupation of property here, contrary to the circumstances in *Loretto*. There, the Court applied the historical rule that a

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[9] NAA Joint Comments at 2-3.

[10] 458 U.S. 419 (1982).

[11] *Id.* at 441.

[12] *Id.* at 439.

[13] *Id.* at 440, n.19.

government-sanctioned, physical occupation of another's property must be permanent to effectuate a taking.[14] Here, by contrast, there is no permanent occupation. If a resident of an apartment installs an 18-inch dish on his or her balcony, for example, there is hardly permanence. The dish will be removed whenever the individual decides to terminate his or her subscription or to move elsewhere. In short, *Loretto* is inapposite, and the proposed preemption rule does not effectuate a taking.

II. THE HOMEOWNERS ASSOCIATIONS' EFFORTS TO NARROW THE SCOPE OF THE RULE SHOULD BE REJECTED

Homeowners associations concede that the language of proposed new paragraph (f) "closely parallels the language of Section 207."[15] Nonetheless, they argue that the Commission's rule is somehow broader than Section 207. Contrary to these assertions, the rule is consistent in breadth and scope with the 1996 Act.

A. The Rule Properly Preempts Only Those Restrictions That Impair A Viewer's Ability To Receive DBS Signals

Consistent with Section 207, the FCC's proposed rule is limited in scope to preempt a restriction only "to the extent that it impairs a viewer's ability to receive video programming services over a satellite antenna less than one meter in diameter."[16] The suggestion by the Reston Homeowners Association ("Reston") and others like it that the *per se* nature of the FCC's preemption rule somehow means that *all* restrictions are preempted, regardless of whether they impair a viewer's ability to receive satellite signals, is, therefore, erroneous.

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[14] *Id.* at 435.

[15] Comments of the Reston Homeowners Association, at 2 ("Reston Comments"); *see also* letter from Vincent Dambrauskas, Virginia Run Community Association to FCC, of April 15, 1996 at 1 ("VRCA Letter").

[16] Further Notice at ¶ 62.

For this reason, the HOA's dire prediction of the intrusive nature of the FCC's preemption rule will never come to pass. For example, if, as Reston alleges, its restrictions do not "diminish the homeowner's ability to receive video programming services . . . [or] decrease the strength, value, amount or quality of the reception,"[17] then Reston has nothing to worry about; its restrictions will not be preempted. Outright bans on satellite antennas, by contrast, unquestionably impair reception and thus will be preempted -- but that is precisely what the statute and the federal interest at stake here require.

B. The Rule Properly Preempts Restrictions That *Impair* Reception Even If They Do Not *Prevent* Reception

SBCA agrees with Reston -- but strenuously disagrees with commenters such as NAA[18] -- that the impairment threshold proposed by the Commission in paragraph (f) of its rule does *not* require a showing that a nongovernmental restriction *prevent*s a consumer from receiving satellite services.[19] As correctly noted by Reston, the Webster's definition of "impair" is not directed at prevention, but rather at a "decrease in strength, value, amount or quality."[20] Had Congress intended to require a preemption only if a nongovernmental restriction *prevented* receipt of satellite services, it could easily have chosen to do so by using the word "prevent." Instead, Congress used the word "impair." To be sure, a nongovernmental restriction that prevents receipt of satellite services certainly impairs such

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[17] Reston Comments at 3.

[18] *See, e.g.*, NAA Joint Comments at 13. Some state and local commenters that are petitioning for reconsideration of the Commission's preemption rule similarly argue that with respect to the FCC preemption of state and local regulations, Congress intended the word "impair" to mean "prevent." SBCA will address those arguments in opposition to their petitions for reconsideration.

[19] *See* Reston Comments at 2.

[20] *Id.*

reception and should be (and will be) preempted. But those rules that impair, but do not prevent, reception are also intended to be preempted by section 207. By closely tracking the statutory language, proposed paragraph (f) of the FCC's rule appropriately implements the Act.

C. The Rule Properly Does Not Shift The Burden Of Proof To Viewers

SBCA unequivocally opposes Reston's suggestion that the FCC shift the burden to homeowners to prove that a restriction impairs their ability to receive DBS signals before they are permitted to install their dish in a manner that deviates from the restriction. The unacceptability of such a scheme is perhaps best illustrated by the comments of another homeowners association, Virginia Run Community Association ("VRCA"). VRCA similarly urges the Commission to shift the burden to consumers to prove impairment, but at the same time concedes that its own guidelines "do not allow any exterior antennas."[21] To impose any such burden of proof on consumers, particularly under circumstances like these, would be wholly unfair and, in any event, precisely what the law was intended to avoid.

As explained at length in SBCA's Further Comments, onerous restrictions imposed by HOA rules have resulted in lengthy and expensive legal battles over the permissibility of satellite antennas.[22] By necessity, if not by design, the burden of challenging an HOA's satellite antenna restrictions currently rests with those few potential satellite consumers who choose to invest the time and financial resources to fight for their right to install a satellite dish. The vast majority of potential satellite services consumers, if faced with the requirement of first

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[21] VRCA letter at 1.

[22] Further Comments and Petition for Clarification of the Satellite Broadcasting Communications Association at 15-23.

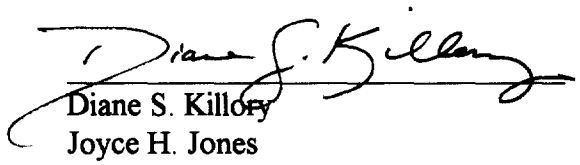
undertaking a battle -- whether with their homeowners association, in court, or at the Commission -- will simply choose the path of least resistance: staying with cable, however unsatisfactory an option they might find it. By legislating against restrictions that impair a viewer's ability to receive satellite service, Congress sought to increase consumer access to alternative services by shifting the burden away from consumers. Reallocating the burden to consumers would defeat the federal interests underlying section 207 of the 1996 Act.

In short, Congress did not direct the FCC to preempt restrictions that the viewer *proves* have the effect of impairing his or her ability to receive satellite signals. Rather, Congress directed the FCC to preempt those restrictions that impair the viewer's ability. Quite simply, that is what the FCC has done in paragraph (f). SBCA therefore urges the Commission to adopt paragraph (f) as proposed.

CONCLUSION

For the reasons set forth in our Further Comments and these Further Reply Comments, the Commission should promptly adopt proposed paragraph (f).

Respectfully submitted,



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